85-1289

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

George Veillette, Petitioner

v.

United States of America, Respondent

APPENDIX

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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January 23, 1986

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APPENDIX ONE

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal No. 82-00018 B

UNITED STATES OF AMERICA

vs.

MICHAEL ABELL, ET AL

DEFENDANTS

MEMORANDUM DECISION AND ORDER
ON MOTIONS TO SUPPRESS

CYR, C.J.

The defendants, under indictment for conspiracy to possess with intent to distribute marijuana, move to suppress certain fruits of alleged violations of their Fourth Amendment civil rights.

I. STATEMENT OF FACTS

At approximately 9:00 a.m. on Tuesday, June 29, 1982, Peter Surette, a Special Agent of the Drug Enforcement Administration (DEA) stationed at

Atlanta, Georgia, advised DEA Special Agent Michael Cunniff, of Portland, Maine, that two suspects in a drug smuggling investigtion had just boarded Delta Flight 454 in Atlanta, destined for Bangor. Surette told Cunniff that the United States Customs Service had information that 40,000 pounds of marijuana was en route to New England and that he, Surette, suspected that the two suspects, defendants Michael Abell and Robert Byers, were traVeling to Maine in connection with that shipment. Surette informed Cunniff that a court-authorized pen register had disclosed that a third drug suspect's telephone had been used that same day to call a telephone in Maine used by George Veillette,[1] whom Cunniff knew to be a drug trafficking suspect. Surette gave Abell a detailed description of Abell and Byers, told

Cunniff that they were traveling under the names "Michael Wilcox" and "Robert Wilson," respectively, and asked Cunniff to investigate their activities in Maine.

Cunniff relayed this information to Sergeant Harry Bailey of the Maine State Police (MSP) and asked Bailey to meet Delta Flight 454 at Bangor International Airport. Flight 454 arrived at approximately 11:15 p.m. A man matching Abell's description deplaned, circled the gate area and approached and greeted a passenger who met the description given for Byers. The two men entered the Airport Hilton Hotel (Hilton).

Cunniff arrived and discussed with Bailey the arrival of the two suspects.[2] Upon request, the Hilton desk clerk showed Cunniff and Bailey a registration card which Cunniff testified showed that a Robert Byers and another

man had checked into Room 902. The clerk told the officers that the two men had suggested that they were going fishing "up north" the next morning. Cunniff and Bailey checked into Room 903.

While in Room 903, between June 30 and July 4, 1982, and by positioning himself next to the door connecting Rooms 902 and 903, Cunniff could overhear conversations and activities in Room 902. Cunniff testified and the Court finds that Cunniff did not press his ear to the door, that he employed no electronic or other aural aides, and that his detailed, sometimes verbatim record of his aural observations of Room 902 was made with pen and paper.[3]

Wednesday June 30, 1982

About 9:36 a.m. on June 30, Cunniff heard someone in Room 902 dial the telephone

and say, "Room 466, please . . . I'll hold for a minute . . . Have him call Mr. Byers, 207-947-6721, extension 5902 . . . Mr. Bauer . . . B-O-W-E-R OR B-A-U-E-R . . . ."

About 9:43 a.m. Bob answered the telephone in Room 902 and told the caller that he was waiting for "Tappey" to come by, that he had not seen "Tappey" yet and that the caller could come whenever he wished. Bob also told the caller, "I should know something real soon . . . I'll try to get back to real quick."

About 10:08 a.m. two persons in Room 902 discussed someone named "Hog".[4]

About 10:35 a.m. one of the men in Room 902 said, "I have to call Ray at 12:00, don't let me forget."

At 11:00 a.m. MSP Trooper Cram, who was on surveillance detail in the Hilton parking lot, saw two men arrive in a

brown Oldsmobile, Wisconsin license AR9191 (brown Olds), and enter the Hilton. At about the same time, Cunniff heard two men enter Room 902. Bob, George (who spoke with what Cunniff considered to be a Maine accent), "Tappey" and Mike were introduced. Someone said, "These guys want to snort coke and drink . . . stash house in the woods." Later in the conversation someone said, "I've been in the woods since last night." One of the men then described how bales were packaged, mentioning "platic wrap," "paper" and "burlap." The same person later said that it was "real consistent"; that "a few broke and we taped them up"; and that he would take the others "down" with him and show them five bales. Later in the conversation, the man who had been referring to the bales asked, "Do you

want to ride out and see the bales?" He said it was a half-hour ride and that they would stop and have lunch on the way. One of the other men said he had "guys in Vermont, Indiana and New York ready to roll." There was also a discussion about terms required by Cubans. One man said the price was $240. Someone said, "It's good commercial."[5]

At approximately 11:15 a.m. all four men left Room 902. Trooper Cram advised Cunniff that at about 11:20 a.m. the same two individuals who had arrived in the brown Olds at 11:00 a.m. exited the Hilton in the company of two others. All four men got into the brown Olds (Tr. 88).

Cram, Cunniff and others followed the brown Olds to "Thee Motorcycle Shoppe" (Shoppe) in Bucksport, Maine, then to a restaurant in Brewer, Maine,

and finally back to the Hilton, where the four men who had left the Hilton in the brown Olds at 11:20 a.m. got out and entered the Hilton (Tr. 89). Bailey and Cunniff got on the Hilton elevator at ground level. It stoped at the lobby level and a man got on. Cunniff engaged the man in conversation and recognized is voice as the man referred to in Room 902 as "Bob." Bob got off at the ninth floor and went to Room 902. Bailey told Cunniff that Bob had been one of the two men who arrived on Flight 454 the night before.

Shortly thereafter Bob (believed to be Byers), Mike, George (believed to be George Veillette) and "Tappey" were either referred to or overheard in a conversation in which "Tappey" said, "It's going to be C.O.D." A short time later someone dialed the telephone and

Bob said to "Bobby,"

> I'm in Bangor, Maine . . . looking good, real good, but it's C.O.D. . . right around $27 . . . got a pencil there? . . . It's 207-947-3721, ext 5902. I'll be here, or Mike'll be here . . . it's really nice . . . fairly moist . . . $27 a pound . . . get the ball rolling, get it off the ground . . . I can probably tell you more tonight.

After the telephone call was completed, Bob commented that "the price sound(s) a little high to him." The men talked about putting suitcases in a car. Someone said, " . . . George, I'll see you soon." One person left Room 902, and then there was a discussion about people arriving, traveling on airplanes with money, and an incident involving the seizure of $4,000 at a time when "there were only four DEA agents in the State." One of the men said, "This time of year it's not bad, because it's full of tourists." There was further

conversation about prices, in which the figures "250" and "260" and the term 'C.O.D.' were mentioned "Tappey" said he had "a couple of other people coming in."

About 1:42 p.m., shortly after someone had entered Room 902, "Tappey" said, "Why don't we take off and give these gentlemen a call later?" A few minutes later two people left Room 902.

At about 1:55 p.m. Trooper Cram saw the two men who had arrived at about 11:00 a.m. leave in the brown Olds, which the officers followed to the Shoppe and later that afternoon and evening, to the Spring Fountain Motel in Bucksport and eventually "Bob," made several telephone calls from Room 902, including one ring which he asked, "Do you have a Robert Bauer registered there?"

About 2:12 p.m. someone dialed the telephone in Room 902 and Bob said ". . .

wanted me to ask you about the 25 you owe him. . . ." After hanging up, Bob commented, "The other day he said he had suitcases full of money. Today he don't remember."

At about 5:20p.m. someone in Room 902 said, "We'll start by taking a truckload. . . ." Shortly thereafter someone said, "John will be here tonight."

At about 11:00 p.m. a number of voices were overheard in Room 902, including the voice of "John." Someone said,

> . . . dry as hell . . . I knew there was some wet ones . . . what happened was it fell in the ocean and the burlap got wet . . . a couple of bales fell out and they got wet . . . he said, . . . throw them two over there . . . 60 to 70 pounds. .

At approximately 11:15 p.m. someone in Room 902 stated,

> . . . he knew TJ . . . 2300 an ounce . . . that's how you tell how good

> it is, as far as purity . . . it will feel the same as mother of pearl will feel . . . my stuff is moist, shiny . . . I don't know anything about testing as far as chemicals . . . bunsen burner. . . .[6]

Thursday, July 1, 1982

At 12:12 a.m. on July 1, 1982, someone in Room 902 said "That's not a very good sample . . . I rolled just one . . . Buzz. . . . " John said that he was leaving and would be in Room 514.

Shortly after midnight (July 1, 1982) Bailey and MSP Corporal Terrence Parsons checked into the Spring Fountain Motel in Bucksport.

At about 9:45 a.m. Parsons saw a white-over-blue Pontiac, Maine license 5657ID, which is registered to George Veillette,[7] Parsons observed a bearded, dark-haired man, later identified as George Veillette, drive away in the Pontiac.[8]

At about 10:00 a.m. (Tr 682), DEA Agent Mona Polen, who was in the parking lot of the Spring Fountain Motel, observed a medium-to-heavy-set male with gray hair and mustache (Tr. 589-90) standing alone in the doorway to a room. About that time Bailey observed two men who "appeared to be Cuban" leave Room 7. Bailey followed them into a nearby restaurant (Tr 1010). The two men spoke what Bailey believed to be Spanish. One of the men pointed to his placemat, on which there was a map of Maine, and said, "Eastport"[9]

At 9:30 a.m. in Room 902, Mike asked, "What's . . . name?" The response was "Walter Wendolkowski." After the telephone was dialed, Mike said, "Walter Wendolkowski's room, please . . . 701. . . Did George get hold of you last night?"

At about 9:51 am.m someone dialed the telephone in Rom 902, and Rob said, "(T)hese people are sticking to their guns . . . they want all the candles on the cake . . . Juna looked at it and was impressed . . . it might be worth looking at . . . cosmetically . . . I haven't seen it all, I was a little bit. . . ." John, who entered Room 902 while Bob was on the telephone and presumably took the phone from Bob, said "Bubba! . . . opened up it was kind of musty, then it sweetened up. I don't think it's excellent, but it's good stuff. . . . If you do come, I have a room in my name, you can stay there."

At about 10:12 a.m. Bob said, "What do you think Tappey's room number is? Mike responded "701." Someone then dialed a four digit telephone number and talked to "Tappey."

After noon, Agent Polen and MSP Trooper Leslie Bridges checked into Room 708 at the Hilton in order to observe the hallway in front of Room 701, which is across the hall. The officers took turns looking through the peephole in the door of Room 708 whenever they were aware of activity in the corridor.

At 2:40 p.m. Bridges saw four men leave Room 701, and obtained partial descriptions of each.

At about 7:45 p.m. Cunniff saw a man enter the brown Olds and drive away from the Hilton. A surveillance team followed the brown Olds to the Stable Inn in Brewer (where a second person entered te car), to a road in Dedham, near a camp owned by George Veillette (Dedham camp), back to the Stable Inn, and finally back to the Hilton.

At 7:05 p.m. Bridges and Polen saw

Abell and Byers, both of whom Polen recognized from her surveillance work in Georgia, knock on the door of Rooom 701 and leave without entering.

At 8:56 p.m., immediately after Bob concluded a telephone conversation by saying "call you right back," someone left Room 902. At the request of Cunniff, another officer asked Polen to see whether Byers was using the pay telephone located near the elevator lobby on the ninth floor. Polen observed Byers talking on the telephone and heard him say, "You know what it is with the Cubans, have to talk to the little man." (Tr. 593.)

At 9:15 p.m. Bridges and Polen saw two men arrive at and enter Room 701. Bridges recognized one of them as being one of the men he had seen at 2:40 that afternoon[10] (Tr. 429).

At 9:30 p.m. Mike said, "What if I bring up about a million . . . two or three million?"

A short time later the names "Stu" and "Ray" were mentioned.

At about 10:00 p.m. Polen saw a man, then known to her as "Tappey," leave Room 701. At 10:07 someone knocked on the door to Room 902 and was let in. Bob (Byers), who had just talked to "Mike" on the telephone, said, "I called Mike. He said you just staggered out of the room." The following conversation took place:

> BOB: I have one guy here who wants to look at some stuff tomorrow morning . . . pick out the best . . .
>
> TAPPEY; They worked until six this morning, then the stash house man crashed. . . . I'll show him five bales in the trunk . . . George . . . if they have money . . . . I can't take 'em to the stash. I'll show 'em bales. 500 pounds, 400 pounds or something . . . he can pick through it. . . . I can't taken (sic) to the stash house . . . he should bring a truck or van . . .

Ryder van at the cottage . . . it's all weighed out and marked . . . they can't bring me a car . . . I can't taken (sic) 'em to the stash house . . . if tey bring something big with them, a truck or a van. . . .

BOB: They want to pick through. . .
TAPPEY: I couldn't get with George. . . . I had to take some other people to show 'em some stuff today. . . . I've already paid them 150,000. I have to get 'em some money. . . .

BOB: They'll want to see 15, 20 bales.

TAPPEY: No problem, I just need a vehicle.

BOB: They want the opportunity. . . . You say it's all the same. . . .

TAPPEY: No problem.

BOB: They can pick what they want?

TAPPEY: Yeah . . . pick through 300,600 . . . if they don't like it we'll get more . . . we have about 300 bales . . . pillows . . .

At approximately 10:35 p.m. Polen observed the elderly latin-looking male she had seen earlier at the Spring Fountain Motel and two other white males

come to Room 701. The elderly man was carrying a paper sack. Someone with a latin accent called out, "Hey O.J." (Tr. 600).[11]

Friday, July 2, 1982

At approximatley 9:25 a.m. on July 2, 1982, someone (presumably Bob) stated, ". . . I was in the shower when Michael hailed me . . . nice but the price is not the best. . . . The stuff is here, every bit of it."

At approximately 9:40 a.m. in the Hilton lobby, Bridges saw a man later identified as James Michael Oliver.[12] Bridges followed Oliver to Room 701, where Oliver knocked and entered.

"Tappey" entered Room 902 at approximately 9:50 a.m. Bob said, "Did you get George? We'll take one guy . . . John doesn't have to go . . . his man,

Heidi, will go."

After Mike had asked John over the telephone whether he "need(ed) to go or just Heidi," Bob said, "John wants to go because he has other people. . . (T)ake John, Heidi, Stuart, me and you . . ." "Tappey" said he had gone with someone the day before at about 3:30 or 4:00 p.m.[13]

At 10:10 a.m. someone in Room 902 dialed an eight digit telephone number and Mike said, "Room 202, please. . . . Tell Stu to get ready . . . we don't have to take Ray . . . Bob, me, Tap and two others." As the phone was dialed again, Bob mentioned the number "5514" then said, "Call when you're ready," and hung up.

The suspects left Room 902 at 10:55 a.m. Cunniff informed MSP Sergeant Peter McCarthy, who was in a surveillance van

in the Hilton parking lot, that five suspects would be coming out shortly. Minutes later McCarthy photographed five men as they exited the Hilton and got into a rental car bearing Maine license plate 566296 (rental car), which Trooper Cram had seen Abell rent earlier and which McCarthy had under surveillance.[14] The rental car was followed to the Ramada Inn, the Shoppe, and finally back to the Hilton parking lot at about 1:10 p.m. (Tr. 1171), where McCarthy saw and photographed six men getting out of the rental car. (Tr. 118, 367).

At about 1:04 p.m. Bridges saw three men leave Room 701, and recorded partial descriptions of them.[15]

At about 1:49 p.m. Bridges observed two men, later identified as Oliver and Wendolkowski,[16] leave Room 701. Oliver was carrying two suticases. At 1:50 p.m.

Cunniff saw three men, one of whom Cunniff later identified a Wendolkowski, get into the brown Olds, which was "tailed" to the Stable Inn, where one person got out (Tr. 969), then to the Shoppe and finally back to the Hilton (Tr. 120).

At about 9:40 p.m. Trooper Bridges observed three individuals, including Byers (Tr. 446, 449), arrive at Room 701, knock and enter. One of them immediately left, saying "I better get Ray or he'll get lost." Shortly, the speaker returned with a fourth person and they entered Room 701. Agent Polen, who had been out of Room 708, returned to it and as a result of her previous involement in the Georgia investigation was able to identify Ray Zeman as he left Room 701.

Saturday, July 3, 1982

At about 10:00 a.m. on July 3, 1982, Bob told "Tappey," who had just entered Room 902, that "John has more people up here and he wants to know if they could take a look." "Tappey" said, "Let me call George." After Bob replied "He's not at the shop," "Tappey" said, "He will be."

At approximately 10:10 a.m. someone in Room 902 dialed the telephone, asked for Room 202, and then spoke to "Ray." In the meantime, "Tappey" said, "I brought two Cubans here this morning . . . you can't fix these Cubans up with women . . . they talk too much. . . ."

At 10:18 a.m. "Tappey" said he was going to call George. After dialing, he said, "I called 989-3633, instead of 825."[17] "Tappey" then asked, "Is George around? . . . Have him call me at the big H in Room 902 right way."

At 10:31 a.m. "Tappey" stated, "I have four Cubans . . . the old man, one worker and a kid. . . . Mike is at the Stable, he has two Cubens with him."

At 10:48 a.m. someone entered Room 902 and "John" said, "My man is playing hard to get. I told him he doesn't have to take it if he doesn't want it." "Tappey" said, "I'm gonna go see my boys." Someone left the room and knocked on a door. In the corrridor "Tappey" said, "What do you say?" Someone responded,"Bueno."

At 11:05 a.m. Mike answered the telephone in Room 902 and called out, "What did we want to ask George, Bob?" Bob said, "Ask him if we can have a peek." Mike said, "okay," and hung up.

Someone said, "John said his guy said it smelled too musty," and someone responded, "Does he have any money with

him?"

"Tappey" returned to Room 902 and Mike told him that George had called and wanted "Tappey" to call him at the shop. "He's ready," Mike said. Shortly thereafter the phone was dialed and "Tappey" asked for George. "Tappey" told George he would get in touch with him at 1:00 p.m. that day. Someone called John and said they could go at 1:00 p.m.

At 11:19 a.m. "Tappey" said that he would spend more time with "the Cubans."

At 6:11 p.m. Bob who had just been talking on the telephone in Room 902, said "He's got money from everyone." Mike responded, "I knew that we would out-wait (sic) them."

At 7:10 p.m., while talking on the telephone, Mike said, "We're waiting for Rorbes to arrive."[18]

Sunday, July 4, 1982

On July 4, 1982 at 7:40 a.m. Mike answered the telephone in Room 902 and said, "Get back, get everything organized and get situated." After hanging up, Mike told Bob that Ray had stayed at the Holiday Inn the night before. Mike again anwered the phone at eight o'clock and said, ". . . Alright . . . I'll get rolling." After hanging up, Mike said, "Ray is with Stu," and Ray said he is ready

At 9:40 a.m. a four digit call was made and Bob said, "Sally, this is Bob. . . . Have Tappey give me a call in 902 when he gets back."

At 9:50 a.m. Mike made a telephone call, asked for Room 202 and said, "We're waiting for Tappey. . . . Tell everyone to relax."

Also at 9:50 a.m. Sergeant Peacock

of the Dekalb County (Georgia) Police Department, while on surveillance duty in the Hilton parking lot, saw Wendolkowski and another man leave the parking lot in the brown Olds (Tr. 559, 560), which proceeded to the Ramada Inn, where it parked.

At 10:00 a.m. Mike said, "How about if we call the motorcycle shop. . . "? Immediately thereafter Mike again asserted that he was going to call the shop. Then he said, "825-3633," and, "George? . . . Mike here. . . . Waiting for you, buddy. . . . Where is he? . . . I've got friends of mine with some coupons and ready to roll . . . we're over here sitting. . . . Juice is in his room now? . . . Okay, tell him to call me." After hanging up, Mike said, "George is ready to go."

At approximately 10:08 a.m. Mike

said, "825-3633" and then said, "George, Mike again; Tap is not around, he's been gone awhile."

At roughly 10:14 a.m. Mike told Bob, who had just gotten out of the shower, "George said Tappey was on his way up . . George said he called Tappey at 8:30 a.m. and George said start getting some people out here. Tappey must have some more people here. . . ."

Meanwhile, at 10:07 a.m. Bridges observed "Tappey" and a man[19] Bridges had previously seen at Room 701 of the Hilton leave the Ramada Inn and get into the brown Olds, which backed up, hesitated and then pulled out followed by a yellow truck. Trooper Bridges followed the two vehicles south on Route 15, while Polen and MSP Trooper Rick Varney maintained airplane surveillance.

At approximately 10:40 a.m. Mike

answered the telephone and said, "Hey! . . . Waiting for you, it's about time! . . . Give us 45 . . . we're rolling." On the telephone again minutes later, Mike said, "He's ready at his place. . . . We're gonna take Stu to work. . . .He can look at the same time Stu's working. . . ." Then someone dialed the telephone in Room 902 and Mike said, "Room 202, please. . . . I'm gonna take a shower right now and then we'll come to get you. Then we'll rock and roll."

Meanwhile, at 10:32 a.m. the yellow truck and the brown Olds had pulled into the parking lot at the Shoppe. A car was moved out of the way and the yellow truck backed up flush against the Shoppe's south wall. At 10:47, Bridges, who had parked his vehicle north of the Shoppe, drove past the Shoppe and saw the yellow truck coming to a stop near Route 15.

Bridges recognized the driver of the yellow truck as the man who had gotten into the brown Olds with "Tappey" 40 minutes earlier.

The yellow truck left the Shoppe at 11:02 and returned to the Ramada Inn.

At 11:17 Cunniff and Peacock saw Abell get into a rental car, which was followed to the Ramada Inn. A few minutes later, Peacock saw Byers, Sachs and a third man (Tr. 137), who Peacock thought might be Forbes (Tr. 561-62), get into a black Jeep Wagoneer and drive away. The Wagoneer was followed from the Hilton to the Ramada Inn.

Shortly after noon Peacock saw a maroon LeBaron automobile and then the yellow truck leave the Ramada Inn, cross the street and pull into a gas station. The driver and a passenger got out of the yellow truck and pumped gas into it. The

driver of the LeBaron, which was parked at one end of the station, went inside the station and returned to the LeBaron. Neither occupant of the yellow truck approached the building or any of the attendants. Both vehicles pulled out, heading toward, and then south on, Interstate 95.

Varney and Polen maintained air surveillance of the yellow truck and the maroon LeBaron. Bridges followed in his vehicle. At Cunniff's direction (Tr. 372), Bailey telephoned McCarthy at his home and instructed him to drive north on I-95 to intercept and stop the yellow truck.[20] Bailey told McCarthy that the truck had been to the Shoppe and was traveling with a lead car, a small maroon "K-car." Bailey said that the two vehicles had just been at a gas station where the driver of the "K-car" had paid

a bill.

McCarthy drove north on I-95 and waited at a cross-over near Sidney, Maine. When he saw the yellow truck pass, McCarthy pulled out. State Troopers, apparently enlisted in the effort by McCarthy on his drive north, stopped the truck and arrested and frisked its occupants, defendants Anello and Verderame, at mile 106.5 of I-95. Trooper Bridges passed the truck, recognizing the driver as one of the men he had seen outside Room 701 at the Hilton, caught up to the LeBaron and pulled it over. McCarthy, who pulled over in front of the LeBaron, observed the driver sitting upright and talking into the microphone of his CB radio, which he apparently was trying to conceal in his lap. As the driver got out of the LeBaron on McCarthy's instruction,

Bridges recognized the driver as the man who had brought the yellow truck to a stop in the lot of the Shoppe. With the assistance of Bridges and DEA Agent Wayne Steadman, McCarthy arrested the driver, defendant Daniel Duval (Tr. 375, 456). In the course of a pat-down of Duval's person, conducted incident to his arrest, the officers seized an adding machine tape

McCarthy returned to mile 106.5 of I-95 and, with a key found on Verderame's person, McCarthy unlocked and searched the back of the yellow truck, where he discovered numerous bales of marijuana.[21] At about 1:30 McCarthy told Bailey, via a radio patchup, that the truck had been stopped and that marijuana had been found (Tr. 391).

The Bangor Ramada Inn was yet another focal point of the investigation.

Sergeant Peacock maintained visual surveillance of the Ramada Inn from a van in the parking lot of the Howard Johnson Motel, across the street. At 2:10 p.m. Sergeant Peacock saw Abell, who was standing with Byers in front of the Ramada, point toward the surveillance van and enter the Ramada. At about the same time Bangor Police Detective Brian Cox, who was conducting aural surveillance of Room 202 (Ramada Inn) from an adjacent room,[22] heard two men[23] enter Room 202 and discuss, with two other men already there, a van parked across the street. One of the men who had just entered Room 202 told another man to check it out. The men then talked about police (Tr. 843).

All of this information was relayed through police channels to Sergeant Peacock (Tr. 565). Pretty soon Peacock

identified Ray Zeman leaving the Ramada Inn and saw him approach the surveillance van. Peacock and his fellow officer secreted themselves and as much equipment as possible. On the present record it seems that Peacock was not able to observe whether Zeman looked into the van (Tr. 566).

At about this time Detective Cox left the Ramada and saw and exchanged gretings with a man meeting the description given Cox by the desk clerk for one of the two occupants of Room 202. The man, later identified as Zeman, approached Cox from the direction of the Howard Johnson Motel, carrying a Howard Johnson food bag.

Meanwhile, between 2:00 and 2:30 p.m., Bailey, Cunniff and several other officers met at the Odlin Road in Bangor to coordinate arrest strategy. The

police decided to arrest Michael Abell, Robert Byers, Walter Wendolkowski, John Sachs and George Veillette, as well as several other suspects whom the officers knew only by a first name or by some description. (Tr. 944.) In order to ensure surprise and to "secure" certain places for search, the officers planned several simultaneous raids. Upon receiving the broadcast of "Code 1000," officers were to go to several rooms at the Hilton, Rom 202 at the Ramada, the Shoppe, and George Veillette's residence in Orrington.

Around 3:10 p.m. Detective Cox, concerned about the long silence in Room 202, went to the desk clerk to learn if Room 202 was still occupied and saw two men paying for Room 202, one of whom was the man Cox had greeted earlier in the parking lot. Cox recognized the voices

of both men as having been overheard from Room 202. After the two men left the desk, the clerk told Cox that they were the men staying in Room 202.

Room 202

At 3:30 the "Code 1000" was broadcast, signaling Cox and several other Bangor policemen to arrest all of the occupants of Room 202 at the Ramada. After knocking on the partially open door, Cox looked into Room 202. Satisfied that no one was in the room, Cox left one officer behind to guard the door to Room 202, then found[24] and arrested the two men (Zeman and Campbell) whom he had seen pay for Room 202. Cox returned to Room 202, supposedly to search for additional suspects (Tr. 862); looked into the open closet and open drawers; and found, seized and looked

through a small address book in open view (Tr. 856).

The Hilton

Upon receiving the "Code 1000," Bangor Police Detective Sergeant Thomas Placella and three other Bangor policemen (at least one of whom was in uniform, Tr. 887) carried out Bailey's order to arrest all occupants of Rooms 701, 813 and 902 at the Hilton. The officers found no one in either Room 701[25] or Room 813.[26]

Room 902

Hearing the television and voices coming from inside, the officers knocked on the door to Room 902, but received no response. With three hand guns and one twelve gauge shotgun in hand, the officers unlocked the door with a passkey, forced the inside chain lock,

entered the room, announced themselves, and said, "You're under arrest," to the four men seated about the two beds, on one of which there was a "good deal of currency" (Tr. 889). The four men (Abell, Byers, Sachs and Wendolkowski) were handcuffed, but were neither informed of their Miranda rights nor questioned in any way. Approximately eight to ten minutes later, Cunniff arrived and read the four men their Miranda rights. As the four acknowledged their rights (Tr. 840, 893), Cunniff recognized their voices as those of "Mike," "Bob," "John," and "Tappey."

The Shoppe

In the meantime, two law enforcement teams had set out to "secure" the Shoppe and the adjacent residence owned by George Veillette.[27]

Sergeant Bailey led a group of at least eight to ten (Tr. 1015) officers at the Shoppe. Several vehicles were parked in the Shoppe parking lot, but neither Veillette's Pontiac nor a pickup truck the police knew he owned was there. Several officers walked around to the left (south) side of the Shoppe building. The windows on the lower portion of the building were covered with what appeared to Bailey to be black plastic. Bailey knocked on the front door and announced himself, but there was no response. After observing a "closed" sign hanging in the front door, Bailey shattered the glass in the door with a cinder block, and several officers entered the premises. Searching the upstairs (ground level) area only in places large enough to hold a person, the officers found no one. Bailey and Parsons proceeded to the

basement area, where Bailey noticed a strong odor of marijuana. Spotting Veillette's pickup truck parked inside the garage door, Bailey picked up the tarp covering the back of the truck and discovered a bale (or bales) of marijuana. Bailey replaced the tarp and went upstairs, leaving the marijuana behind. Bailey dispatched several officers to the Veillette camp in Dedham, where defendant Veillette was found and arrested. The officers kept the Shoppe under guard until it was searched pursuant to warrant on the evening of July 6, 1982.

The 'Pool Party'

"Code 1000" was also the signal to another group of law enforcement officers to "secure" the Veillette residence. Armed with shotguns, hand guns, and an

Ouzi machine gun, the officers came down the driveway and through the woods, yelling "You're under arrest," to a group of about 20 men, women and children enjoying a Fourth-of-July pool party. The officers kept their guns trained in the general direction of the assembled guests for approximately 15 minutes.

Led by MSP Sergeant Moody, several police officers went directly to the Veillette house. Fourteen-year-old Dawn Bowley was playing a video game in the living room with Samantha Stubbs, age 10. Ms. Bowley went to the kitchen in response to a knock at the door and was "grabbed" by one of the policemen who were already inside with guns drawn. Ms. Bowley testified that the officers refused to let her go and get Samantha. After perhaps five minutes,[28] three other officers arrived and returned Ms. Bowley

to the pool area.

With the permission of Moody, a Mr. Morang was taking photographs of the officers. When Bailey arrived, he told Morang that he did not want his undercover agents to be photographed; Bailey took the camera from around Morang's neck and had the film stripped from it.[29]

Bailey and Mrs. Veillette entered the house. Bailey said he was securing the house awaiting a search warrant. Mrs. Veillette testified that she was told that she was under arrest and informed of her rights. In response to Bailey's inquiry she said her husband did not live at the residence.

The pool party guests were allowed to leave at approximately 5:00 p.m., after their names and addreses had been recorded. Several guests remained at the

residence with Mrs. Veillette, who was not allowed to leave the premises or to enter the house without a police escort until after the house had been searched pursuant to warrant on July 6.

The Stable Inn

During the afternoon of July 4, 1982, Sally Ivers told police officers that she had met Walter Wendolkowski and Mike Oliver earlier in the week at Room 701 of the Hilton and that Oliver, who had been staying in Room 701, later moved to Room 23 at the Stable Inn in Brewer. Upon receiving this information, Cunniff asked Parsons to determine whether Oilver was registered in Room 23 at the Stable Inn.

At about 9:30 p.m. Parsons, Customs Patrol Officer Bergstrom and one other officer went to the Stable Inn and were

informed by the desk clerk that Rooms 23 and 30 were registered under Oliver's name. With at least one gun drawn, the officers knocked on the door of Room 23. When Oliver came to the door the officers identified themselves, and Parsons told Oliver thlat he wanted to ask some questions regarding the investigation. The officers put their guns (or gun) away and entered the room at Oliver's invitation. Parsons advised Oliver of his Miranda rights (Tr. 788). Oliver responded "no" when asked whether he "had" another room. But after Parsons said he knew that Room 30 was registered to Oliver, Oliver acknowledged that it was. When asked, Oliver said his father-in-law was staying in Romm 30, but that he did not know if anyone was in the room right then. Olive said he did not want to talk any more. With Oliver's

permission and using a passkey Parsons entered and searched Room 30, finding no one.

Parsons phoned Cunniff and told him that Oliver had booked Rooms 23 and 30 and that Oliver was in possession of a marijuana cigerette (Tr. 929). Cunniff ordered the arrest of Oliver. Parsons told Oliver to pack whatever he wanted to into a suitcase. Oliver's two suitcases (one open; one closed) were seized and later searched pursuant to warrants.

Varney and Polen, who had been trying to locate the latin-looking suspects, recognized an unmarked police car in the parking lot of the Stable Inn, and stopped. Officer Bergstrom informed Polen and Varney of Oliver's arrest and that Oliver had a second room, Room 30. Polen testified that someone (Cunniff) instructed Polen to watch Room

30.[30] A cab pulled into the lot. Three men and two women got out. Varney testified and the Court finds that the five persons went upstairs, walked down the exposed corridor, entered Room 30 and shortly thereafter came out carrying luggage. Polen recognized the men as the latin-looking suspects, and the men were arrested as they walked down the stairs.[31]

At approximately 8:00 p.m. a Bangor police officer informed Cunniff that he had received a report that a man had appeared at the Hilton and asked for John Sachs. Cunniff dispatched Bangor police officers to the Hilton to learn whether this man would come to the police station. The officers returned with David Root. Cunniff advised Root of the nature of the investigation and said that although Root was not under arrest he

would be advised of his constitutional rights. Root replied that such advice was unnecessary. He said he had gone to the Hilton to visit John Sachs, his favorite bartender, and to have some lobster. When asked about his relationship with Sachs, Root refused to answer any further questions. After refusing to consent to searches of his car, briefcase, and suitcase, Root terminated the interview and left the police station (Tr. 143-44).

At approximately 9:30 p.m. Cunniff encountered Root in the Hilton parking lot. Cunniff told Root that he was impounding Root's car, briefcase and suitcase (Tr. 348) for the purpose of obtaining a warrant. Root refused to surrender the items. But after Cunniff told Root that he would be subject to arrest if he continued to resist, Root

authorized and Cunniff conducted searches of the car and suitcase and Root surrendered the briefcase.[32] Root asked to be present during the search of the briefcase. Cunniff said he wasn't sure that was possible and asked what was in the briefcase. Root said it contained $40,000 of his own money. Cunniff asked Root why he carried money around in a briefcase and Root responded that he did not like banks. Cunniff gave Root a receipt for the briefcase and departed.

Shortly thereafter Polen advised Cunniff that she thought that a description of the man Cuniff twice had interviewed matched that of "Boatman,"[33] whom Polen had seen exit Room 701 on July first or second. At approximately 10:00 p.m., pursuant to Cunniff's orders, Bangor Police officers arrested Root.

. . .

II. THE MERITS

H. The Search of the Shoppe

1. The Entry

Warrentless searches,[86] although ordinarily unreasonable, Coolidge v. New Hampshire,403 U.S. 443, 479 (1971); Katz v. United States, 389 U.S. at 357, are constitutional if the Government establishes, see Coolidge v. New Hampshire, 403 U.S. at 455, that they are justified by the requisite exigent circumstances. Id. at 479; Vale v. Louisiana, 399 U.S. 30,34-35 (1970); United States v. Irizarry 673 F2d at 557; United States v. Edwards. 602 F.2d at 459. Exigent circumstances exist where there is "a compelling need for official

action and no time to secure a warrant.[87] United States v. Adams, 621 F.2d 41, 45 (1st Cir. 1980), citing Michigan v. Tyler, 436 U.S. 499, 509 (1978). The Government contends that preservation of evidence, prevention of flight by suspects and safety of the officers justified the warrantless entry. In reviewing the officers' actions, the Court considers the combined effect of all of the alleged exigencies. See Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970) [stating that a number of factors are relevant in testing a warrantless entry made to facilitate an arrest, including whethe the suspect is armed and whether escape is likely]. See also Texas v. Brown, 51 U.S.L.W. at 4363-64 [stating that exceptions to the warrant requirement are "flexible" and that the "central requirement" of the

Fourth Amendment is one of "reasonableness"].

Each claimed exigency depends on the possibility that someone in the Shoppe might learn that the police were closing in, a factor which is addressed in the First Circuit's extensive quotation from United States v. Flickinger, 573 F.2d 1349, 1356 (9th Cir.), cert. denied, 439 U.S. 836 (1978), as an instance in which a warrantless entry was justified in the interest of preventing the destruction of evidence:

> In Flickinger, . . . government agents had arrested defendant's confederates about three hours before they entered his home without a warrant. The court held that
>
> [i]t would not be unreasonable for the DEA officers to fear that a warning telephone call would come to the [defendant's] home from [defendant's confederates] or from someone they would contact. . . . In addition, . . . the agents could reasonably [have] believe[d] that . . . a concerned prospective recipient [of the drugs to be

> delivered by defendant's arrested confederates] might alert [defendant] that the delivery was overdue and thus had possibly been intercepted. Id. at 13556.

United States v. Edwards, 602 F.2d at 468. Because Flickinger's home was the center of the illicit acitivities, "such a telephone call would reasonably be expected." United States v. Flickinger, 573 F.2d at 1356 n.1. Likewise, Cunniff and Bailey reasonably believed that the Shoppe was being used to warehouse a substantial quantity of marijuana available for sale through the Shoppe's owner. Thus, it was not unreasonable to expect that any such warning would reach the Shoppe. True, the officers had some reason to suspect that the yellow truck, which had Ohio license plates, was far from its destination when stopped on I-95.[88] Moreover, the officers designedly refrained from stopping the

yellow truck until Bangor was beyond the range of its CB radio. Compare United States v. Segura, 663 F.2d 411, 415 (2d cir.1981) [holding a "sweep search" unreasonable where arrest took place out of view of the searched premises], with United States v. Vasquez, 638 F.2 507, 529-32 (2d Cir. 1980) [upholding "sweep search" when arrest occurred within view of searched premises which police reasonably believed to be occupied at time of arrest], cert. denied, 450 U.S. 970 (1981). But in view of the furtive actions of various defendants [89] the officers had reason to believe that persons in the yellow truck would either be expected at their destination or some intermediate place by a certain time or be required to report periodically by telephone or radio.

Furthermore, the very fact that the

police surrounded the Shoppe increased substantially the risk tht anyone inside would learn that the "jib was up." Of course, the police cannot serve up their own exigencies, United States v. Segura, 633F.2d at 415; Niro v. United States, 388 F.2d 535, 450 (1st Cir. 1968), but certainly these officers were justified in guarding the Shoppe to prevent the destruction and/or distribution of the remaining marijuana "stash" which they reasonably believed to be there.[90]

Finally, after discovering marijuana in the possession of suspects who were apparently on their way out of the jurisdiction, the police planned simultaneous arrests of the principal suspects. These raids, which were to take place in the Bangor area, compounded the likelihood of a warning.[91]

Of course the possibility that a

warning telephone call might reach the Shoppe was meaningless absent reason to suspect that someone was inside. When the officers arrived at 3:30 p.m. on July 4 no noise or light came from inside the building, neither of Veillette's vehicles was in the lot and there was no response to Sergeant Bailey's knock and announcement at the front door, in which a "closed" sign hung. Yet the police did have reason to believe that suspects might be hiding in the Shoppe. Black paint covered the windows in the downstairs area. Since the downstairs area is accessible from the parking lot through a garage door and since the upstairs area served as a business showroom, the downstairs area was the more likely site of the suspected marijuana "stash." Furthermore, several cars were parked in the Shoppe's lot and

the officers could be practically certain that the Shoppe had been occupied earlier that holiday.[92] While in Room 903 Cunniff had overheard at least one reference to a "stash house man." Based on their experience the officers testified that "stash houses" are often kept under armed guard. Therefore, the police had reason to believe that suspects, particularly armed guards, might be hiding in the Shoppe.

Although the suspected marijuana "stash" was too voluminous to have been readily destroyed, the police had reason to suspect that other evidence, such as cash receive as a result of the C.O.D. marijuana transactions, or incriminating documents, might be found in the Shoppe.[93]

The risk that the Shoppe might be under armed guard created a significant

theat to the safety of the police. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives. . . ." Warden v. Hayden, 387 U.S. 294, 298-99 (1967); United States v. Irizarry, 673 F.2d at 558. As defendant Veillete poins out [Memorandum of defendant Veillette, at 11] and as Sergeant Bailey acknowledged [Tr. 1050], if indeed the Shoppe had been under armed guard, the very act of entering would have been "dangerous." But the surrounding circumstances made police entry practically inevitable unless the officers could talk, bore or starve all potential armed suspects out of the Shoppe. Waiting would only delay, not avoid, confrontation. Correctly anticipating that a warrant might not be obtained for some time, Bailey

apparently concluded that the possibility that any trapped guards might attempt to shoot their way out, perhaps under cover of darkness, imposed the greater danger [Tr. 1050]. When an officer charged with the safety of his men reasonably and in good faith makes such a dertermination, courts are hard pressed to call a different play on Monday morning. Similarly, a careful reading of the cases makes clear that because the stakes are higher, where the threat is to human life, as opposed to evidence, a lesser degree ot risk will excuse a warrantless entry. United States v. McEachin, 670 F.2d 1139, 1145 (D.C. Cir. 1981); United States v. Allison, 639 F.2d 792, 794 (D.C. cir. 1980). See United States v. Irizarry, supra; United States v. Picariello, 568 F.2d 222, 226 (1st Cir. 1978). The concept of reasonableness

which is "central" to the Fourth Amendment, Texas v. Brown, 51 U.S.L.W. at 4364, mandates such an approach. In this case the combined risks to evidence and life presented a "compelling need for [immediate] official action." United States v. Adams, 621 F.2d at 45.[94]

2. Search of the Truck

Nevertheless, the search was lawful only insofar as it was "strictly circumscribed by the exigencies which justified its initiation," Mincey v. Arizona, 437 U.S. 385, 393 (1978); United States v. Irizarry, 673 F.2d at 558. Nothing in the recorded indicates that the officers "deviated from an objectively reasonable hunt for an armed . . . person id., except perhaps when Bailey looked under the tarp covering the back of the pickup. The evidence

establishes that the pickup was fitted with a heavy custom-made tarp which, when properly secured, was held in place by 60 to 80 snaps. Bailey could not reasonably have believed that an armed person would be hiding under that tarp if it was completely snapped closed. The tarp could not have been closed completely by someone underneath it. The police had already searched the remainder of the premises and found no one in the Shoppe [Tr. 808-10]. It would seem highly improbable that someone else had hidden an armed man under a tarp in the back of a truck and then left him to guard an otherwise unoccupied building. Although the evidence is unclear as to whether the tarp was completely fastened when Bailey looked into the back of the truck, the Government, which has the buren of proof as to exigent

circumstances, and could readily have clarified the record by calling Bailey to testify on redirect, bears the responsibility for the consequences of an incomplete record.

Accordingly, the Court finds that he tarp was properly secured and, therefore, that Bailey conducted an unreasonable warrantless search by looking under it. See United States v. Irizarry, supra.

3. Fruits

The two bales of marijuana must be suppressed. They were discovered during the illegal search of Veillette's pickup truck and remained under the continuous control of the officers from the time of their discovery until formally seized ursuant to warrant. See United States v. Edwards, 602 F.2d at 469 n.12. Although the officers had already decided to apply

for a warrant to search the Shoppe, the Government does not, and could not successfully, contend that the inevitable discovery rule applies to the two bales of marijuana.

> The assertion by police (after an illegal entry and after finding evidence of crime) that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment.

United States v. Griffin, 502 F.2d 959, 961 (6th Cir. 1974).[95] See United States v. Segura, 663 F.2d at 417. Cf. United States v. Alvarez-Porras, 643 F.2d at 65 [holding evidence discovered during warrantless search admissible only because Government met its "heavy buren" by showing that officers conducting search reasonably believed warrant had

been signed].

I. July 6 Search of the Shoppe

Veillette Contends that the July 6 warrant to search the Shoppe was invalid because false statements were either knowingly or recklessly included in the supporting affidavits, see Franks v. Deleware, 438 U.S. 154, 155-56 (1978); United States v. Southard, 700 F.2d 1, 7-8 (1st Cir. 1983). The Court cannot agree.

Cunniff did not act with intentional or reckless disregard for the truth in stating that Bailey had observed "several marijuana bales," instead of two,[96] or that the yellow truck had been backed up flush to the Shoppe for "thirty minutes," rather than fifteen.[97] But even assuming these misstatements were recklessly made they were not sufficiently substantial or

material to warrant exclusion of the evidence seized pursuant to the search warrant. See Franks v. Delaware, 438 U.S. at 156; United States v. Southard, 700 F.2d at 9; United States v. Edwards, 602 F.2d at 465.

Veillette's argument that the affidavits impermissibly made reference to the 60 bales of marijuana discovered in the yellow truck must fail for two reasons. The search of the yellow truck was valid, Part II, B supra, and, had the search been invalid, Veillette has not shown that it intruded upon any legitimate expectation of privacy on his part, see United States v. Webe, 668 F.2d at 560.

Stripping away any mention of the marijuana unlawfully discovered in the Veillette truck, the affidavits nevertheless amply established probable

cause to search the Shoppe; the search warrant therefore was valid. Grimaldi v. United States, 606 F.2d 332, 336 (1st Cir.), cert. denied, 444 U.S. 971 (1979).[98]

J. Search and Seizure of Veillete Residence

1. Initial Entry

The government insists that "the initial intrusion into the residence was [justified by] the same probable cause and exigent circumstances that [justified] the raid on [the Shoppe]."[99] The "raid" on the Shoppe withstands constitutional challenge because Cunniff and Bailey reasonbly believed that the Shoppe was the "stash house" and that it might well be under armed guard and contain readily destructible evidence.

Part II, H.1, supra. Although the Veillette residence is adjacent to the Shoppe,[100] there is no evidence and no substantial indication that either Bailey or Cunniff believed[101] that the residence was a "stash house."[102]

If the officers had any cause to believe that evidence might be found at the residence, it must have been based on some unfocused inference that evidence is likely to be found in the nearby home of the owner of an adjacent business establishment connected with criminal activity.[103] But although such an inference might hae been sufficient to support the issuance of a search warrant for the residence, United States v. Johnson, 660 F.2d 749 (9th Cir. 1981), cert. denied, 455 U.S. 912 (1982); United States v. Timpani 665 F.2d 1, 4 (st Cir. 1981) [upholding warrant for search of

defendant's residence where affidavits established probable cause to believe defendant was involved in organized gambling and loansharking], it does not amount to the "clear showing of probable cause," Dorman v. United States, 435 F.2d at 392, generally required to sustain a warrantless intrusion. See note 72 supra. There is no indication, testimony or other evidence that the residence was or might be under armed guard. Whatever remote prospect there may have been that the Veillette residence was a "stash house" was further diminished by the fact that, before ever entering the house [Tr. 1193,1195-96], Sergeant Moody discovered a private pool party in progress on the premises, with men, women and young children in attendance.

2. Seizure

Furthermore, if the initial entry itself had been lawful the extraordinarily intrusive nature of the seizure of the residence rendered the police conduct unreasonable under applicable Fourth Amendmen standards. Seizures, like searches, are "ordinarily per se unreasonable within the meaning of the Fourth Amendment unless . . . accomplished pursuant to a judicial warrant. . . ,"United States v. Place, 51 U.S.L.W. 4844, 4845 (June 20, 1983). Warrantless seizures, like warrantless searches, see p. 64 supra, must be strictly circumscribed by the exigencies which justified their initiation. See United States v. Place, 51 U.S.L.W. at 4847-48, [holding unconstitutional a 90-minute investigatory detention of luggage where investigation should have been conducted more expeditiously]; 2 W.

LaFave, Search & Seizure §65(c); Note, Police Practices and the Threatened Destruction of Evidence, 84 Harv. L. Rev. at 1478-79.

Within an hour after their invasion of the Veillette residence the officers acquired sufficient information to emasculate whatever basis they may have had for believing that evidence would be found inside the residence. Mrs. Veillette informed Bailey that George Veillette did not live at the residence. At about the same time, George Veillette was arrested at his camp in Dedham.[104] The officers discovered no suspects, incriminating evidence or contraband during their initial search of the Veillette residence. Yet they detained all of the party guests for approximately one and one-half hours and recorded their names and adresses before permitting them

to leave. Thereafter. for more than two days armed officers guarded the residence, preventing Mrs. Veillette from either leaving the premises or entering her home without a police escort.

Although Cunniff testified that he has never obtained a federal search warrant in Maine in less than two days, the Court rejects the contention advanced by the Government that a federal search warrant generally cannot be obtained in less than two days.[105] Agent Cunniff testified and the Court finds that it is a policy of the office of the United States Attorney for the District of Maine to preclude unwritten warrant applications. Such a policy cannot serve as a justification for prolonging a warrantless seizure. Because prosecutors, like the police, are "engaged in the often competitive

enterprise of ferriting out crime," Johnson v. United States, 333 U.S. 10, 14 (1948), prosecutors are precluded from issuing search warrants. Collidge v. New Hampshire, supra. Like the police, see United States v. Segura, 663 F2d at 415; Niro v. United States, 388 F.2d at 540, prosecutors must not be permitted to circumvent the warrant requirement by creating or exacerbating exigent circumstances.[106] Moreover, it appears that despite the policy of the United States Attorney's office federal warrants can be obtained in Maine in substantially less than two days. See note 105 supra.

Given the absence of the requisite exigent circumstances, the paucity of information indicating that the residence was at all involved in the conspiracy, and the overriding policy of protecting the privacy of the home, Payton v. New

York, 445 U.S. at 585, the initial warrantless search and the ensuing seizure of the Veillete residence represented unreasonable governmental intrusions in violation of the Fourth Amendment.

3. Fruits

Veillette contends that the search conducted pursuant to warrant on July 6 was but a single aspect of "one fifty-five hour long atrocity" and that therefore the evidence discovered during the search must be suppressed as the direct fruit of the initial search and the ensuing seizure of the residence. In United States v. Edwards, supra, however, the First Circuit rejected a similar argument on similar facts. The First Circuit explained that in United States v. Berrett, 513 F.2d 154 (1st Cir. 1975),

and United States v. Berkowitz, 429 F.2d 921 (1st Cir. 1970), it had recognized

> that the exercise of dominion, especially where agents secure the premises and physically restrain the occupants, United States v. Berkowitz, . . . 429 F.2d at 925, and display weapons, United States v. Berret. supra, 513 F.2d at 155, may transform a mere entry into the premises into an effective seizure of articles therein for Fourth Amendment purposes. However, in Berkowitz, supra, and Berrett, supra, the articles in question were in plain view of the government agents as they entered the defendants' premises; discovery of those articles unavoidably was the direct result of the initial entries. Here, although the agents did exercise complete control over the occupants of Edwards' home, their discovery of [the package containing heroin] required an additional affirmative step on their part. They entered for the sole purpose of securing the premises and did not conduct the necessary search until it was autorized by a valid search warrant. Therefore, the government's exercise of dominion, without more, cannot be identified factually with the seizure of the package.

United States v. Ewdards, 602 F.2d at 469 n.12.

Edwards does not stand for the proposition that evidence discovered during a search can never be the suppressible fruit of a prior seizure of the searched premises, but for the more limited view that as-yet undiscovered evidence is not the direct product of a warrantless seizure and that its suppression is appropriate only if mandated under the "fruit of the poisonous tree" analysis. Id.[107] A different analysis would risk frustrating the deterrent function of the exclusionary rule by "encourag[ing] law enforcement to 'secure' or seize places or things with or without probable cause in the absence of a warrant or exigent circumstances while they seek some independent evidentiary basis to justify a search warrant." United States v. Crozier, 674 F.2d 1293, 1299 (9th Cir.

1982) [suppressing evidence obtained under search warrant, because of unlawful prior seizure of premises]; United States v. Allard, 634 F.2d 1182,1187 (9th Cir. 1980) [same]. See also United States v. Griffin, supra [excluding evidence discovered in securing premises and subsequently seized pursuant to warrant].

The fact that no evidence was discovered during the initial intrusion or the ensuing seizure weighs heavily against the suppression of the evidence seized during the July 6 search. See United States v. Edwards, 602 F.2d at 465 n.12. But other relevant circumstances mandate suppression. The unlawful seizure of the residence continued up to the commencement of the search during which the evidence was seized. Since there appears to have been no sufficient cause for the warrantless seizure or for

its unreasonable duration, the Court considers the protracted seizure of the residence a flagrant Fourth Amendment violation.

The tendency of a search warrant to attenuate an earlier taint, see Johnson v. Louisiana, 406 U.S. at 365, is vitiated here by the fact that the affidavits may have misrepresented evidence as to any involvement of the Veillette residence in the criminal enterprise, see note 102 supra, and omitted all relevant information indicating that the residence was not involved, see p. 69 supra, cf. United States v. Melvin, 596 F.2d at 498-99 [indicating that Franks v. Delaware applies to intentional and reckless omissions, as well as to misstatements, of material fact].

Therefore, the items seized from the

Veilette residence are the suppressible fruits of the earlier illegal search and seizure.[108]

K. The Dedham Camp Search

Veillette mistakenly contends that the warrant authorizing the search of his Dedham camp was not based upon probable cause. The underlying affidavits set forth sufficient facts to compel the conclusion that Veillette was a central figure in the conspiracy.[109] These affidavits demonstrate that Veillette was followed to the Dedham camp after an apparent meeting with another suspect, probably Wendolkowski, and was found and arrested at the Dedham camp.[110] One of the affidavits includes a transcription of the July 1 conversation in which "Tappey," speaking to Abell and Byers, referred several times to "George," and

said, "I can't take 'em to the stash. I'll show 'em bales . . . 500 pounds, 400 pounds or something . . . he can pick through it . . . Bring a . . . Ryder van at the cottage. . . ." Given the evidence in the affidavit that "George" Veillette controlled arrangements for viewing the marijuana, the magistrate could fairly conclude that the "cottage" was Veillette's Dedham camp. These facts, in combination with Cunniff's belief, based upon experience, that evidence would be found in the camp, provided probable cause for the search. See United States v. Timpani, 665 F.2d at 3-4 [probable cause to search residence of suspected loanshark-gambler, despite (apparent) absence of evidence connecting residence to crimes]; United States v. Johnson,

660 F.2d at 753 [probable cause to search

apartment residence of two suspects in major drug transaction where officer believed additional evidence would be found]; United States v. Stefanson, 648 F.2d 1231, 1236 (9th Cir. 1981) [probable cause to search home of suspect, who, inter alia, possessed seconal capsules when arrested, and agent swore persons carrying such drugs are likely to have large cache at home]; United States v. Melvin, supra, [probable cause to search bombing suspect's home when experienced officer believed that bomb probably was made in a shop]. . . .

1/The calls were made to Thee Motorcycle Shoppe [Tr. 555], Bucksport, Maine, owned by defendant Veillette.

2/Throughout the course of the ensuing investigation, Cunniff, Bailey and other officers conferred regularly. At their nightly debriefings the officers discussed their observations. By using a two-way radio and the telephone in Room 903 of the Hilton, where Cunniff was stationed most of the time, Cunniff was

informed almost immediately of much of what the other officers observed. Except where otherwise indicated, the Court is satisfied that Cuniff was informed of the various observations of the fellow officers, prior to the various arrests to which those observations are relevant.

3/After the arrests were made and search warrants wee obtained Cunniff used a typewriter to improve legibility. Both the typed and handwritten versions of his notes were admitted into evidence. Various defense counsel attempted on cross-examination to show that Cunniff could not hear or transcribe accurately what went on in Room 902. Certain marginal notations made by Cunniff, such as "T.V. loud," and his apparent inability to determine whether an individual, frequently referred to in Room 902, was called "Tappey" or "Tabby," or whether he heard "30,000" or "300,000" on one occasion, do indicate that at times Cunniff had some difficulty hearing. Furthermore, Cunniff's notes contain ellipses, some of which indicate portions of conversations in Room 902 which he could not make out. (Cunniff also employed ellipses to indicate silences during phone conversations.) His notes show that he summarized, rather than transcribed, several conversations, particularly conversations not directly pertinent to the subject matter of the investigation. Nevertheless, the Court is entirely satisfied that Cunniff's notes represent an accurate record of his aural surveillance of Room 902.

4/During the search of Thee Motorcycle Shoppe on July 6, 1982, a written

memorandum of a phone message was found, indicating that a "Bob Bowers" had called for "George." Cunniff's affidavit, executed on July 8, states that he then believed that "Bob Bowers" referred to "Robert Byers." Arguably, this indicates that Cunniff was not when aware of Robert Bauer's suspected involvement. Nevertheless, the Court accepts Cunniff's unchallenged testimony that, prior to July 4, he learned that a Rober Bauer, also known as "Willie the Hog," was believed to be a major drug trafficker and was under investigation by the DEA in Georgia [Tr. 80].

5/Cunniff testified that "stash house in the woos" means "a warehouse for drugs in an isolated area," [Tr. 84], and that "$240" probably referred to the wholesale price of a pound of marijuana. [Tr. 86.]

6/Cunniff testified to a belief, based on his experience, that this discussion related to methods for testing the purity of cocaine [Tr. 88].

7/Precisely when the investigating officers discovered that the Pontiac was registered to George Veillette is unclear [Tr. 782, 1009]. But the record indicates [Tr. 805, 1009] and the Court finds that it was prior to 3:30 p.m. on July 4,1982.

8/Later that day Parsons saw the same man driving the Pontiac south on Route 15 in Orrington, Maine. He also observed the vehicle at the Shoppe and at Veillette's camp in Dedham [Tr. 782].

9/Bailey informed Cunniff of these

observations [Tr. 1026], but the present record does not enable the Court to determine whether Agent Polen was made aware that Bailey had overheard this conversation.

10/This man was later identified as defendant Valdes. On crossexamination, Bridges acknowledged that his notes, written shortly after his observations, reflect that at 9:15 the man's white shirt had red lettering on it and that at 9:15 he noted that the man's baseall cap, which Bridges had identified at 9:40 p.m. as being red, was, in fact, red and white [Tr. 484-86]. Furthermore, his contemporaneous notes reflect that the man "may be same seen earlier" [Tr. 499-500]. Polen and Bridges consistently were able to get only "partial descriptions" of the visitors to Room 701 and Bridges acknowledged that the hallway was "under lighted" [Tr. 517].

11/Agent Polen testified that the man was supporting the sack by holding it from the bottom, in a manner she considered to be unusual.

Through various overheard conversations, the police determined that "O.J.," like "Tappey," was a nickname for Wendolkowski.

12/At that time Oliver was not known to the police. Bridges did not know Oliver's name, not did he identify Oliver prior to arrest.

13/Cunniff's handwritten notes indicate that "Tappey" made reference to 3:30-4:00 p.m. The typewritten version of the

notes indicates "3:30, 4:30."

14/McCarthy testified that the men he observed met descriptions Cunniff provided him over the radio.

15/Bridges later identified two of the men as defendants Anello and Duval [Tr. 433-34].

16/Prior to July 4, Cunniff, Bridges and others identified Walter Wendolkowski and realized that he was "Tappey."

17/Although thee was no direct testimony as to exactly when, the Court finds that prior to July 4, 1982 Cunniff determined that 825-3633 is the telephone number for the Shoppe.

18/Surette had told Cunniff that a pen register had disclosed that, on June 29, 1982, the same telephone used to call a phone used by George Veillette had been used to call a phone used by Robert Forbes. Surette told Cunniff that Forbes was a suspected drug trafficker under investigation by the New York office of the DEA [Tr. 37].

19/Bridges later identified the second man as defendant Daniel Duval.

20/Cunniff testified that he ordered both vehicles followed and, once out of CB radio range, stopped. But the record indicates and the Court finds that Bailey did not relay the order to stop the LeBaron.

21/Before opening the truck, but after taking the keys, McCarthy noticed a

strong odor of disinfectant emanating from the truck [Tr. 376]. After entering the truck McCarthy smelled marijuana, moved some junk furniture and saw he marijuana bales [Tr. 376-77].

22/Cox had gone to the Ramada Inn at approximately 1:30 for the purpose of conducting the surveillance of Room 202. The desk clerk told Cox that Room 202 was registered to a Pat Thomas of Miami and was occupied by two people, including a white male approximately 30 years of age with a nicely trimmed beard and a sunburned face [Tr. 842].

23/Cox was apparently uncertain as to whe the two or three men entered Room 202 at this point [Tr. 85].

24/Campbell and Zeman were found playing a video game in a game room adjacent to Room 202.

25/Cunniff testified that at 3:30 officers arrested Sally Ivers, who was hiding in a closet in Room 701 [Tr. 925]. Although Placella testified on direct examination that no one was found in Room 701 at 3:30 [Tr. 887], on cross-examination he testified that Sally Ivers was arrested in Room 701. But he did not say when she was found [Tr. 902].

26/Bailey testified that the officers were instructed to go to Rooms 701, 902 and 514, not to Room 813 [Tr. 1019].

27/Although the Shoppe and the residence are adjacent to ech other, apparently they are located in Bucksport and Orrington, Maine, respectively.

28/Sergeant Moody testified that indeed they did keep a "woman," who "could have been fourteen," in the house for "less than five minutes" and that after turning her over to other officers, he did find another "woman" coming down the stairs. Although Ms. Bowley testified that she was detained for ten minutes the Court considers it likely that under these circumstances Officer Moody was better able to estimate the length of Ms. Bowley's detention.

29/Mr. Morang and Mrs. Veillette testified that Bailey sruck Morang. Bailey testified that he did not recall striking anyone [Tr. 1056]. Sergeant Moody testified that although he observed Bailey take the camera, he observed no physical contact between Bailey and Morang.

30/Cunniff testified that after having been advised that Oliver had two rooms at the Stable Inn, he directed Polen and Varney to go there [Tr. 938]. But since Polen testified [Tr. 607] that they went to the Stable Inn by chance and since Cunniff acknowledges that Polen and Varney may have been at the Stable Inn when he talked to them [Tr. 973], the Court finds that it was not until after Polen and Varney arrived at the Stable Inn that Cunniff directed Polen to watch Room 30.

31/Polen testified that from outside of Room 30 the men looked over the rail and then started to "bolt"' that although she and Varney jumped out of the car and yelled "freeze, police, federal agents,"

the suspects continued to run; and that she and Varney moved their car toward the exit and arrested the suspects. It seems unlikely, however, that Varney would forget such a sequence of events. Since the Court found Varney to be a credile witness, it accepts his version of the events.

Furthermore, Polen testified that she informed several other officers, including Cunniff, that the suspects had "bolted." Yet neither Cunniff's testimony nor (apparently) his reports included any reference to these material events.

32/The record indicates and the Court finds that the suitcase and automobile were searched and the briefcase seized prior to Root's admission that the briefcase contained $40,000. On direct examination, while apparently describing these events chronologically, Cunniff testified as follows:

> After some further discussion, he agreed to give me the briefcase and consented to the search of the suitcase and the car. I didn't find anything in either the car or the suitcase. I asked him what the briefcase contained, and he told me it was 40,000-some-odd dollars of his own money.

[Tr. 144-45]. The record is unclear in several other respects. It seems that the two encounters between Root and Cunniff were relatively brief, but there was no testimony as to their length. It is also unclear whether other officers accompanied Cunniff during these

encounters. The assertion in Root's Memorandum that Cunniff was accompanied by two officers during the second encounter, though consistent with the recitation of facts in the Government's prehearing memorandum, is not supported by the hearing record.

33/The agents apparently assigned code names, such as "Boatman," to keep track of suspects whose names they did not know.

. . .

86/The measures taken on July 4, 1982 to "secure" the Shoppe constituted a search. See United States v. Edwards, 602 F.2d at 467-68.

87/In view of recent Supreme Court decisions, e.g., United States v. Ross, supra, "whether the exceptions [to the warrant requirement] are still 'jealously drawn' may be debated." United States v. Weber, 668 F.2d at 560. Indeed, just last term, Justice Rehnquist, writing for a four-judge plurality, noted that "in a wide range of diverse situations we have recognized flexible, common-sense exceptions to [the warrant] requirement." Texas v. Brown, 51 U.S.L.W. at 4363.

88/For example, one of the four men in Room 902 shortly after 11:15 a.m. on June 30 said that he had men in Vermont, Indiana and New York "ready to roll."

89/For example: Sergeant Bailey witnessed Abell and Byers stage a bogus chance-encounter in the gate area of the Bangor International Airport terminal

[Tr. 17]; the police had reason to believe that Abell changed rental cars [Tr. 96-97, 136]; Cunniff had heard the suspects discussing the danger posed by weigh stations along the highway [Tr. 86]; Veillette was apparently unwilling to permit certain people to visit the "stash house" [Government Exhibit 2A, at 10]; and the persons associated with the truck apparently employed a "lead car" in order to detect police activity en route.

90/As already discussed, the investigation indicataed that the Shoppe was used either as the "stash house" or as a place to view the marijuana. The discovery of marijuana in the yellow truck substantially increased the likelihood that the Shoppe was the "stash house."

91/The Government does not contend and its witnesses did not intimate that the possibility that Abell, Byers, Zeman and Campbell had spotted Peacock's surveillance van increased the likelihood of a warning. Accordingly, the Court is satisfied that the various officers who ordered the search of and/or searched the Shoppe were unaware of that possibility.

92/The probability that at 3:30 p.m. the Shoppe was occupied and contained destructible evidence might have been insufficient to excuse a warrantless entry solely to preserve evidence. See United States v. Jeffers, 342 U.S. 48, 51-52 (1951); United States v. Congote, 656 F.2d 971, 974 n.2 (5th Cir. 1981); United States v. Griffin, 502 F.2d at 960. But in view of the overriding need for safety, a likelihood that premises

are occupied, though too slight to justify a search to preserve evidence, may justify an entry to reduce danger. United States v. McEachin, 670 F.2d at 1145; United States v. Allison, 639 F.2d 792, 794 (D.C. Cir. 1980). See United States v. Irizarry, supra; United States v. Picariello, 568 F.2d at 226.

93/The strong evidence that the Shoppe's owner was deeply involved in the conspiracy and that a significant C.O.D. transaction related to the conspiracy had taken place at the Shoppe that morning provided additional reason to suspect that more readily destructible evidence, such as currency and/or documents, would be in the Shopope. Even if the documents and currency could not have been destroyed in seconds;, see p. 46 supra, the police reasonably could believe that any such evidence would be destructible in the hours and perhaps days needed to obtain a warrant.

94/Veillette does not contend that the officers delayed unreasonably by not seeking a warrant prior to entering the Shoppe, thereby vitiating any exigency. See Niro v. United States, 388 F.2d at 538-40.

95/The case for suppression is even stronger here than in Griffin. There is no evidence that any police officer had commenced the process of obtaining a warrant by the time Bailey discovered the marijuana.

96/Veillette relies on the testimony that Bailey observed "a bale of marijuana" [Tr. 1016]. But since the warrant return

reflects that two bales were found in the truck, it is likely that Bailey merely misspoke at the hearing. And since the information was passed from Bailey to Cunniff and then put into the affidavit the Court finds that the reference to "several" bales was at most negligent.

97/In fact, the truck was backed up flush to the Shoppe for approximately 15 minutes. But the difficulty defense attorneys had eliciting this evidence [Tr. 511-515] and the fact that the truck was at the Shoppe for approximately 30 minutes substantiate the conclusion that this was a negligent misstatement at most.

98/Veillette seeks the suppression and return of items seized on July 6 but not specified in the warrant as objects of the search. Since many of the items are identified in Veillette's memorandum and on the warrant return either as "miscellaneous papers" or by such descriptions as "boat regisration" or "property plans," it is impossible to determine whether they were seized pursuant to the warrant. Accordingly, defendant Veillette and the Government are allowed ten days to submit whatever documenary evidence and/or memoranda may enable the Court to determine which, if any, items seized were beyond the scope of the warrant.

But since the warrant authorized the seizure of various documents which the officers reasonably could have believed would be in he Shoppe safes, the seizure of the safes was lawful, because it was far less intrusive than an immediate

search would have been, United States v. Place, supra; Texas v. Brown,, 51 U.S.L.W. at 4367. Indeed, it may be that the safes could have been searched immediately. See United States v. Ross, 456 U.S. at 821 [stating that a warrant authorizing the search of a home for weapons authorizes the search of "closets, chests, drawers, and containers" in which weapons might be found]; 2 W. LaFave, Search and Seizure, at §4.10(b). It is at least arguably irrelevant that these were safes as opposed to some other type of container:

> [J]ust as the most frail cottage in the kingdom is absoluteiy entitled to the same guarantees of privacy as the most majestic mansion, so also may a travels a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticted executive with the locked attache case.

United States v. Ross, 456 U.S. at 822 [footnote omitted]. But assuming that the contents of a safe are entitled to greater protection than the "closets, chests, drawers, and containers" referred to in the Ross dictum, that increased protection was afforded here since the seized safes were searched pursuant to a warrant specifically authorizing their search.

99/Although the evidence indicates that Veillette was not living in the residence at the time, the Government does not dispute and the Court finds that he had a

reasonable expectation of privacy in the residence presumably owned by him in which his wife was residing.

100/Apparently the residence is about 200 to 300 yards from the Shoppe [Tr. 1113]. Since it appears from the record that there is a dirt road leading directly from the public highway to the residence [Tr. 063] and the Government has offered no evidence to the contrary, the Court finds that in order to drive from the Shoppe to the residence it is necessary to use the public highway.

101/Although Bailey testified that the marijuana "could have been" kept at the residence [Tr. 1037], he clearly believed the 'stash' was kept at the Shoppe, not at the residence [Tr. 1035-37]. Moody did testify that the officers who went to the residence were armed because 'there had been some proable cause, or whatever, that maybe there was some marijuana there; and if there were large amounts of marijuana, we have found that there were people guarding them, and they have guns." [Tr. 1210.] But the record does not support Moody's hypothesis.

102/No suspect, not even Veillette, had ever been sen at, or ever been heard to mention or telephone, the residence. Although the affidavits filed in support of the warrant application include several references to suspects traveling to the "Veillette property" in Orrington, the testimony indicates that in fact on those occasions the suspects were followed to the Shoppe. For example, one of the affidavits states that at 11:35 a.m. on June 30 several suspects

traveling in the brown Olds "disappear[ed] from view on property owned by a George Veillette and on which is located Veillette's motorcycle shop, residence and outbuildings." Yet Cunniff testified that at 11:20 a.m. on June 30 a surveillance detail in which he participated followed the brown Olds "to [the] Shoppe." Since the Court has no reasons to doubt Cunniff's more specific testimony and since the affidavits were not admitted for the truth of the matters asserted in them, the Court finds that when the officers followed various suspects to the Veillette property at the Bucksport-Orringon town line the officers in fact ascertained that the suspects went to the Shoppe. See note 100 supra.

103/See notes 100 & 102 supra.

104/Although Bailey and the other officers at the residence may not have learned of George Veillette's arrest immediately, it is certain that Bailey kneew of the arrest long before the search of the residence on July 6.

105/Indeed, in a recent Maine drug-smuggling case, a federal agent, acting under Cunniff's instructions, obtained a federal warrant in two and one-half hours.

> At approximately 5:15 p.m. [because a suspect issued an apparent warning], Cunniff instructed DEA Special Agent Wayne Steadman to arrange with the United States Attorney's office in Portland for a warrant to search the Turkey Cove premises. At approximately 6:45

> p.m., Cuniff learned by radio that the warrant was expected to issue within the next 45 minutes.

United States v. Hensel, 509 F. Supp. at 1381. The magistrate signed the warrant at 7:45 p.m. and Cunniff was immediately informed that Steadman was on his way, with the warrant. Id. at 1383. Although Hensel does not directly contradict Cunniff's testimony, since Steadman, not Cunniff, obtained the warrant and since it is unclear whether affidavits were being prepared as the investigation proceeded, the case does establish that a federal warrant can be obtained in Maine within hours of the prosecutorial decision to apply.

106/The warrant requirement mandates not only that a search warrant be obtained, except in exigent circumstances, but also that warrantless searches and seizures be strictly circumscribed by the exigencies which justify their initiation.

Furthermore, nothing in Fed. R. Crim. P. 41 requires DEA agents to comply with such policies of the United States Attorney.

107/Edwards intimates that it is the application of the exclusionary rule to the "indirect" products of an unlawful search or seizure which implicates the "fruit of the poisonous tree" analysis. United States v. Edwards, 602 F.2d at 469 n.12. See Wong Sun V. United States, 371 U.S. 471, 484 (1963); 3 W. LaFave, Search and Seizure §11.4 at 612.

Of course, theer must be some factual link between the official unlawfulness and the discovery of the evidene, which is satisfied where, as here, the presises and all its contents are under the control of the Government for the two-day period immediately preceding the warranted discovery of the contents. See United States v. Allard, 634 F.2d 1182, 1187 (9th Cir. 1980).

108/Accordingly, the Court does not consider whether the search warrant was based upon probable cause.

109/In the affidavit, Cunniff relied, not only on many of the facats upon which the Court has relied in upholding the searches of the yellow truck and the Shoppe on July 4, but also on several significant facts learned after the Fourth. For example, one of the affidavits states that an address book found on defendant Guillen's person contained the telephone number of the Shoppe [Government Exhibit 5T, at 15].

110/One of the affidavits states that at 8:10 p.m. on July 2 the brown Olds and Veillett's Pontiac left Veillett's "place in Orrington." The brown Olds was followed to the Hilton. The Pontiac was followed to "a camp on the northside (sic) of Lakeview Avenue, Dedham, Maine" [Government Exhibit 5T at 13]. The affidavits establish that the Dedham camp is on the north side of Lakeview Avenue and that the brown Olds was regularly used in furtherance of the conspiracy, at least occasionally by Wendolkowski [Government Exhibit 5T, at 7, 10].

APPENDIX TWO

United States Court of Appeals
For the First Circuit

No. 85-1127

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

GEORGE E. VEILLETTE, JR.

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

[Hon. Conrad K. Cyr, U.S. Distrit Judge]

Before

Campbell, Chief Judge

Bownes and Torruella, Circuit Judges.

December 2, 1985

TORUELLA, Circuit Judge. This appeal arises out of an indictment charging nineteen persons with conspiracy to possess over a thousand pounds of marijuana with the intent to distribute the drug. See 21 U.S.C. § 841 and 846. It was the government's position that the conspirators were involved in the purchase and sale of a large supply of marijuana which was kept near Bangor, Maine. Eleven of the ninteen were tried by a jury. The convicted defendants, with the exception of the herein appellant Veillette, who fled following conviction, were sentenced on May 16, 1984. Their convictions were upheld by this court. See United States v. Anello, No. 84-1406 (1st Cir. June 20, 1985).

Veillette raises three issues on appeal. First, he claims that the district court erred in failing to

suppress evidence found and seized in his motorcycle shop. Second, he claims that his right to a speedy trial was violated and, finally, that the court should have declared a mistrial based on juror misconduct. These last two issues were raised on appeal by Veillette's codefendants and carefully examined by us. We reject these claims here for the same reasons stated in the Anello opinion, supra.

On July 29, 1982, the Drug Enforcement Administration in Maine received information that 40,000 pounds of marijuana were en route to that state. Drug Enforcement Administration agents waited for two of the principal particpants to arrive at the airport and followed them to their hotel, where aural surveillance was established. This was supplemented by the physical surveillance

of the various persons believed to be involved, as well as of the premises known as Thee Motorcycle Shoppe (Shoppe), which was owned by suspect George Veillette and which was believed to be the stash house for the contraband.

On July 4, 1982, the day chosen to close in on the operation, a yellow truck that had been under surveillance was backed up to the Shoppe. After a period of ten to thirty minutes during which the truck was apparently loaded, it drove away and headed south from Bucksport, Maine on an interstate highway. When the truck reached a point on the road that was out of range of radio contact with those sites from which the conspirators could call to warn others, the agents stopped and searched the vehicle. They discovered numerous bales of marijuana in the truck.

Between 2:00 and 2:30 PM that same day, D.E.A. agents met with the police officers to coordinate arrest strategy, with a goal to ensuring surprise and "securing" certain places for search through several simultaneous raids.

About one hour later, a team of eight to ten law enforcement agents arrived at the Shoppe. Although several vehicles were parked in the parking lot, the vehicles that police knew belonged to the appellant were not among them. Several officers walked around to the south side of the building. They noticed that the windows on the lower portion of the Shoppe were covered with an opaque black material. The door was locked, the sign on it indicating that the business was closed. Sergeant Bailey knocked on the front door and announced the officers' presence. There was no

response. Nothing was see nor heard from the outside to indicate that anyone was there. Bailey shattered the glass of the door with a cinder block and several officers entered the premises. Searching the main floor area only in places large enough to hide a person, the officers found no one. Proceeding to the lower level, they spotted Veillette's pickup truck parked inside the garage. Bailey unsnapped the tarp which completely covered the truck bed and discovered marijuana bales. He replaced the tarp and went upstairs, leaving the contraband where it was found. Having secured the Shoppe, the officers left it under guard until a search warrant was obtained on the evening of July6, 1982.

Warrantless searches,[1] although ordinarily presumed to be unreasonable, Coolidge v. New Hampshire, 403 U.S. 443,

479 (1971); United States v. Picariello, 568. F. 2d 222, 225 (1st Cir. 1978), are constitutional if the government establishes the requisite exigent circumstances. See Welsh v. Wisconsin, 104 S. Ct. 2091, 2097 (1984); United States v. Baldacchino, 762 F.2d 170, 176 (1st Cir. 1985); United States v. Irizarry. 673 F.2d 554, 557 (1st Cir. 1982). In determining whether the circumstances of a case fall into one of the emergency conditions characterized as exigent circumstances, the court must consider: the gravity of the underlying offense; whether delay poses a threat to police or the public safety; whether there is a great likelihood that evidence will be destroyed if there is a delay until a warrant can be obtained. United States v. Baldacchino, supra, at 2098; Warden v. Hayden, 387 U.S. 294 (1967);

United States v. McConney, 728 F.2d 1195 (9th Cir. 1984).

Following a suppression hearing the district court held that exigent circumstances existed for entering the premises. It went on to find, however, that the truck bed concealing the marijuana ws secured in such a way that no one could havae been hiding under it. Therefore, finding that specific search illegal, the district court suppressed only that particular evidence.

The standard of review of an appeal from denial of a motion to suppress is that the decision will be upheld if any reasonanble view of the evidence supports the trial court's deicsion. United States v. Kiendra, 663 F.2d 349, 351 (1st Cir. 1981).

In reviewing the evidence in light of the totality of the circumstances, we

do not find the exigent circumstances present to justify the officers' forcible intrusion into the Shoppe.[2] The police had in custody the only persons capable of warning other co-conspirators prior to the simultaneous raids, and precautions had been taken to prevent such a warning. At the time of the raid they neither saw nor heard anything that would indicate that the premises were occupied. We cannot, therefore, reasonably conclude that the alternative of securing the building from the outside without prior intrusion presented a demonstratable risk to the officers or a great likelihood that evidence would e destoyed. The district court did not make specific findings on the matter, but rather speculated on various possibilities that might have given the police "reason to believe" that exigent circumstances

existed. This does not create the conditions necessary to overcome the need to obtain a warrant.

Appellant argues that, because the search warrant was partially based on evidence obtained in the illegal search, probable cause was lacking. Therefore, all evidence seized under that warrant is alleged to be "fruit of the poisonous tree" and should be suppressed. Wong Sun v. United States, 371 U.S. 471, 484 (1963). We do not agree. Initially, we find there was sufficient probable cause to stop and search the yellow truck that was found to contain numerous bales of marijuana. The movements of the alleged conspirators and their conversations overheard well in advance of the decision to stop the truck clearly indicated that a drug deal was in progress. The positioning of the truck at the Shoppe

for what appered to be loading strongly supported the belief that it was being used at that time to transport the contraband. Although there were no bales of marijuana visible at he time, there was every reason to beliee the conspirators were carrying out their plans. Therefore, we find no objection to the use of this evidence as support for probable cause to issue the search warrant for the Shoppe. Moreover, the conversations between the suspects to which D.E.A. Agent Cunniff attests in his affidavit amply support the probability that the Shoppe was a central location for the organization of the conspiracy and that it was being used to stash the conrtaband. We, therefore, have little difficulty finding that the warrant to search the Shoppe was adequately supported.

We also find the duration of the seizure of the Shoppe, from 3:30 PM on July 4th until the search warrant was issued July 6th, was not unreasonable within the meaning of the fourth amendment. The arrests and raids occurred on a Sunday and the following Monday was a legal holiday. The record shows that Veillette was arrested shortly after the Shope was secured, so that any actual interference with his possessory interest in the presises was virtually nonexistent. See Segura v. United States, 104 S. Ct. 3380, 3390 (1984). In view of the complex circumstances of the case, we do not find the delay unreasonable.[3]

Whether all the evidence obtained at the Shoppe need be suppressed is controlled by Segura, supra. The question in Segura was

> [W]hether, because of an earlier illegal entry, the Fourth Amendment requires suppression of evidence seized later . . . pursuant to a valid search warrant which was issued on information obtained by police before the entry into the residence.

Segura, supra at 3382.

The court held that

> [T]he evidence discovered during the subsequent search of the apartment the following day pursuant to the valid search warrant issued wholly on information known to the officers before the entry into the apartment need not have been suppressed as "fruit" of the illegal entry because the warrant and the information on which it was based were unrelated to the entry and therefore constituted an independent source for the evidence under Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

Id. at 3383.

In the case at bar, excluding the already suppressed evidence found on the premises, the affidavit squarely rests on evidence obtained prior to the illegal entry. That evidence, in our view, was more than adequate in itself to establish

probable cause for issuance of a search warrant. In Franks v. Delaware, 438 U.S. 154, 171-72 (1978), the Supreme Court held that, if an affiant knowingly includes a false statement in a warrant affidavit, the warrant will stand if, "when material that is the subject of the alleged falsity of reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause."

Knowingly including a false statement in a warrant affidavit seems the functional equivalent of (if not an even more serious transgression than) including in the affidavit knowledge of facts illegally obtained. Logically, then, the bales of marijuana that were improperly included in the warrant affidavit here should be dealt with in a similar fashion, i.e., they should be set

to one side (as the district court did) and the remaining content of the affidavit examined to determine whether the was probable cause to search, apart from the tainted averments.

To be sure, unlike the situation in Segura v. United States, 104 S. Ct. 3380 (1984) and our own recent case of United States v. Moscatiello , slip op., No. 84-1192 (1st Cir. Aug. 26, 1985), the tainted evidence here was included in the warrant affidavit and thus reached the magistrate. However, the approach we follow, taken from Franks, is squarely within the Supreme Court's recent admonition that "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position

than they would have been if no police error or misconduct hnd occurred." Nix v. Williams, 104 S. Ct. 2501 (1984) (discussing independent source doctrine) (emphasis in original). We therefore affirm the district court's refusal to suppress all of the evidence obtained pursuant to the search warrant for the Shoppe.

In a last ditch effort to convince us that something, anything, should be suppressed, appellant challenges the specificity of the warrant, including in his brief a long list of items seized, that he claims do not fall within any of the categories listed in the warrant. The government conceded that some of the items seized were beyond the scope of the warrant. The court found, however, that many of thse items did fit categories such as "marijuana handling and

processing equipment" and "documents such as . . . tally lists, personal (sic) assignment sheets [and] payment records."4 Other evidence, the court believed, would easily survive scrutiny based on the plain view doctrine. See Coolidge v. New Hampshire, 403 U.S. 443, 465-73 (1971). The appellant unfortunately presents to us the same general challenge which he presented to the district court. Thus, without knowing which specific admissions of evidence the appellant find objectionable and what error is alleged, we have no basis upon which we can find them clearly erroneous. See United States v. Kiendra, 663 F.2d at 351

Affirmed.

"Dissent follows"

BOWNES, Circuit Judge (dissenting). My brothers correctly find that the search of the Shoppe without a warrant was illegal because there were no exigent circumstances. Then, on the purported authority of Segura v. United States, 52 U.S.L.W. 5128 (U.S. July 5, 1984), and Franks v. Delaware, 438 U.S. 154 (1978), they go on to hold that the warrant obtained in partial reliance on what was observed during the illegal search and issued at least forty-eight hours after the entry is valid. This extends Segura, distorts Franks, and effectively overrules Wong Sun v. United States, 371 U.S. 471 (1963).

In Segura, the issue, as stated by the Chief Justice, was "whether drugs and

other items not observed during the initial entry and first discovered by the agents the day after the entry, under an admittedly valid search warrant, should have been suppressed." 52 U.S.L.W. at 5130. The Chief Justice noted that "[e]vidence obtained as the direct result of an unconstitutional search or seizure is plainly subject to exclusion." Id. Under the facts of Segura, "[n]o information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant." 52 U.S.L.W. at 5133. That is not the fact situation here; what the agents observed during the illegal search was made part of the affidavit application for the warrant that was issued.

In Segura, the time lapse between the initial entry and the issuance of the

warrant was nineteen hours. The holding of Segura is specific:

> Specifically, we hold that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessary interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unrasonable seizures.

52 U.S.L.W. at 5129 (emphasis added) (footnote omitted). My brothers have extended the time approved in Segura from ninteen hours to forty-eight hours. They do this "[i]n view of the complex circumstances of the case." Slip op. at 8. I see nothing complex in the circumstances; in fact, it is a fairly straightforward case. It is suggested that the delay was due to the fact that the day following the seizure was a

holiday, the Fourth of July. But the warrant was not issued until the evening of July 5. How much delay will be approved in the future on the basis of unarticulated complex circumstances?

The majority recognizes that it is stretching Segura out of context so it turns to Franks v. Delaware, 438 U.S. 154, to justify its validtion of the warrant. With due respect, I do not think Franks applies. The difference between Segura, the instant case, and Franks is that in Franks there was no illegal entry. Franks was directed to the problem of using deliberate falsehoods or recklessly disregarding for the truth in order to obtain a warrant. In transferring the excision approach of Franks to this case, my brothers havae completely eviscerated Wong Sun v. United States, 371 U.S. 471 (1963), which

held:

> In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, Boyd v. United States, 166 U.S. 616, this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. Weeks v. United States, 232 U.S. 383. The exclusionary prohibition extends as well to the indirect as the indirect products of such invasions. Silverthorn Lumber Co. v. United States, 251 U.S. 385.

Id. at 484-85.

The inclusion of illegally obtained information in an affidavit for a search warrant is bound to taint the magistrate's determination of whether the warrant should issue. The question is not, as in Franks, whether the warrant can stand if the false statements are set aside, but whether the magistrate is able to make an objective and careful scrutiny of the affidavit in order to

decide if a search warrant should issue. See United States v. Leon, 52 U.S.L.W. 5155, 5159 (U.S. July 5, 1984) and cases cited therein. The court noted in Leon:

> Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination. Spinelli v. United States, 393 U.S., at 419. See Illinois v. Gates, 462 U.S., at ___ United States v. Ventresca, supra, at 108-109.

Id. In my opinion, the fourth amendment demands that the magistrate's warrant decision not be partially based on tainted material.

For the reasons stated, I think the warrant was invalid and the evidence pursuant to it should have been suppressed. I respectfully dissent.

1/The measures taken to secure the Shoppe

constitute a search. See U.S. v. Jacobsen, 104 S. Ct. 1652, 1656 (1984). (A search occurs when an expectation of privacy that society is prepared to considers reasonable is infringed.

2/Even when an exigency is found, the least restrictive intrusion must be employed, or the whole constitutional requirement of obtaining a warrant would be defeated. When it is known that no one is resently on the premises, the propeerty may be secured by merely guarding the entrances. United States v. Palumbo, 742 F.2d 656 (1st Cir. 1984). In the case at bar, it appeared more likely than not that the presmises were unoccupied and the possibility of persons hiding in the basement was speculation.

3/This is not to say, however, that we will generally condone such lengthy delays. While the delay here was acceptable under the particular circumstances of the case, future cases will continue to be judged in light of their specific facts.

4/The district court correctly limited its consideration to items which the government intended to introduce at trial. The suppression issue was moot as to items in which the government had no interest as evidence